Filed 4/24/12 Ruzzano v. Spectrum Pacific Learning Co. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ARTHUR RUZZANO, Plaintiff and Respondent, v. SPECTRUM PACIFIC LEARNING COMPANY, LLC et al., Defendants and Appellants.	D059377 (Super. Ct. No. 37-2010-00104168-CU-FR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

In this employment dispute, plaintiff Arthur Ruzzano initially instituted arbitration proceedings against defendants Spectrum Pacific Learning Company, LLC (Spectrum), Cynthia Larson-Daugherty (Larson), David M. Blake (Blake), and National University (collectively, defendants) pursuant to an arbitration agreement he signed hours before he was fired. However, when Ruzzano discovered during the arbitration proceeding that Spectrum had been planning adverse employment action against him prior to his signing the arbitration agreement, he withdrew from the arbitration and instituted this action.

In response, defendants filed a petition to compel arbitration, which Ruzzano opposed. The court denied the petition to compel arbitration, finding (1) none of the defendants signed the arbitration agreement, (2) defendants Blake and National University were not parties to the arbitration agreement, (3) no valid arbitration agreement existed because it was procured by fraud, and (4) Ruzzano did not waive his right to challenge the arbitration agreement because he immediately withdrew from arbitration upon discovering he had been misled in to signing the agreement.

Defendants appeal, asserting (1) there was an enforceable arbitration agreement between Spectrum and Ruzzano, (2) all defendants were entitled to enforce the arbitration agreement, (3) Ruzzano did not meet his burden of presenting specific facts of fraud directed to the arbitration clause, and (4) Ruzzano waived any argument the arbitration agreement was unenforceable by initiating the arbitration proceeding. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Spectrum's Hiring of Ruzzano*

According to Ruzzano, in April 2009, when he was employed at a stable, steady job earning approximately $156,000 a year, Larson contacted him regarding a position she was seeking to fill at Spectrum. Larson told Ruzzano that part of the compensation package was a bonus plan under which Ruzzano would be paid based upon revenue from Spectrum's nonaffiliate client base and the National University system. Larson told Ruzzano that although his base pay would be lower than his present job, he would more than make up for it with the bonus compensation plan.

According to Ruzzano, relying on Larson's representations concerning Spectrum's client base and revenue, he accepted a position with Spectrum as vice president of professional services. However, after he began working at Spectrum, he discovered that Larson had been untruthful concerning its client base and revenue. Larson dramatically overstated Spectrum's existing business and therefore his bonus potential. In October 2009 Ruzzano made Larson aware of his belief that she had misled him concerning these facts and that she had also misled National University concerning Spectrum's sales projections.

Ruzzano also discovered that Spectrum had a very high employee turnover and substantial employee discontent because of Larson's management style. Blake, the associate vice president for human resources at National University, which provided human resources support for Spectrum, confirmed this to Ruzzano after he started working at Spectrum.

B. *Ruzzano's Alleged Deficient Performance*

According to Blake and Larson, in October 2009 Larson complained to Blake about alleged deficiencies in Ruzzano's performance.[1] However, neither Blake nor Larson told Ruzzano of these concerns.

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1 Ruzzano filed a motion to augment the record to include this evidence, which was before the trial court, but not part of the clerk's transcript on appeal. Defendants did not oppose the motion, and on September 27, 2011, we granted the motion to augment.

C. *Ruzzano Signs Employment Agreement Containing Arbitration Clause*

On October 29, 2009, Blake met with Ruzzano and provided him with an employment contract which contained an arbitration clause. However, Blake did not tell Ruzzano at that time of his alleged substandard performance. On November 3, 2009, at Blake's urging, Ruzzano signed the employment agreement.

No one on behalf of Spectrum ever signed the employment contract.

D. *Ruzzano's Termination*

A few hours later, on that same date, Larson told Ruzzano he was being terminated. Larson told Ruzzano he would be paid a severance through March 31, 2010. Larson instructed Ruzzano to prepare an e-mail to Blake confirming his termination, which Larson edited.

Larson later decided not to pay Ruzzano a severance and placed him on administrative leave. Ruzzano was terminated again on January 13, 2010.

E. *Ruzzano Initiates Arbitration Proceedings*

In January 2010 Ruzzano initiated arbitration proceedings pursuant to the arbitration clause in his employment agreement. After exchanging document requests, Ruzzano took Blake's deposition on November 9, 2010. During that deposition, Ruzzano discovered that Spectrum was allegedly dissatisfied with his performance prior to his signing the employment contract. The next day Ruzzano dismissed the arbitration proceedings.

F. *The Instant Action/Petition To Compel Arbitration*

In November 2010 Ruzzano filed this action against defendants, stating claims for fraud, concealment, breach of contract and failure to pay overtime compensation.

That complaint alleged, as to the fraud claims, that he left his previous employment based upon the representations made by Larson, as to Spectrum's book of business revenue, and his ability, through the bonus structure, to exceed his previous salary. Ruzzano further alleged, however, that after he started working at Spectrum he discovered the information Larson "provided Ruzzano to induce him to leave his employment and come to work for [Spectrum] dramatically overstated [Spectrum's] existing business and therefore his bonus potential based on [Spectrum's] existing business." The complaint alleged that Ruzzano was harmed by Spectrum and Larson's fraud because he (1) voluntarily left his job to join Spectrum (2) did not make commissions at Spectrum based upon its represented business, (3) was unemployed for a period of time after his termination, and (4) suffered emotional distress.

As to the breach of contract claim, Ruzzano alleges that when he accepted the job offer on April 20, 2009, Spectrum and he entered into a written contract. Ruzzano further asserted that under the express terms of that agreement, he could only be terminated, demoted, suspended or disciplined for cause. Ruzzano also alleged that if he was terminated without cause he was entitled to be paid through June 30, 2010. Ruzzano alleged that Spectrum breached that agreement by suspending, demoting, and finally terminating him without cause.

Finally, Ruzzano alleged that Spectrum violated Labor Code section 510 by forcing him to work uncompensated overtime hours.

Defendants responded by filing a petition to compel arbitration. In that motion, they asserted (1) there was a valid agreement to arbitrate, (2) all defendants were covered by the agreement to arbitrate, (3) the agreement was not unconscionable, (4) Ruzzano's fraud claims could not avoid the requirement that his claims be arbitrated, and (5) he waived his claims that the arbitration clause was unenforceable by initiating arbitration proceedings.

Ruzzano opposed the petition, asserting (1) the arbitration agreement was unenforceable because none of the defendants signed the agreement, (2) Blake and National University were not covered by the agreement because he was not employed by them, and (3) the agreement was unenforceable because it was procured by fraud.

The court denied the petition to compel arbitration, finding: "[Defendants] have the burden to show that a valid arbitration agreement exists, and have failed to carry that burden. [Spectrum] never signed the arbitration agreement, and the circumstances indicate neither party contemplated there would be an agreement unless both parties signed. Further, neither [National University] nor Blake is covered by the Arbitration Agreement. [¶] The preponderance of the evidence demonstrates no valid arbitration agreement exists because it was procured by deceit on the same day [Ruzzano] was placed on administrative leave. The time to obtain an arbitration agreement was in or around April of 2009, when [Ruzzano] was hired. Defendants' attempt to obtain the arbitration agreement months later, while secretly contemplating adverse employment

action, is grounds for rescission. [¶] Finally, [Ruzzano] did not waive his right to challenge the arbitration agreement because he immediately withdrew from the arbitration upon discovering he had been misled in the inducement of the arbitration agreement."

This timely appeal follows.

DISCUSSION

I. *STANDARD OF REVIEW*

We review a court's decision on a motion to compel arbitration, where it has resolved disputed facts, under the substantial evidence standard of review. (*Brown v. Wells Fargo Bank, NA* (2008) 168 Cal.App.4th 938, 953.) Under this standard of review we must presume the court found every fact and drew every permissible inference necessary to support its judgment or order, and we must defer to the court's determination of credibility of the witnesses and weight of the evidence in resolving such disputed facts. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.)

II. *APPLICABLE LEGAL PRINCIPLES*

The controlling statutory authority concerning the enforcement of arbitration clauses is set forth in Code of Civil Procedure sections 1281 and 1281.2. Section 1281 states: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, *save upon such grounds as exist for the revocation of any contract*." (Italics added.) Section 1281.2 states in part: "On petition of a party to an arbitration agreement alleging the existence of

a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] . . . . (b) *Grounds exist for the revocation of the agreement*." (Italics added.)

In *Larian v. Larian* (2004) 123 Cal.App.4th 751, 759-760, the Court of Appeal explained the general rules for enforcement of an arbitration clause: "[T]he right to compel arbitration depends upon the existence of a valid agreement to arbitrate between the parties. [Citations.] The question of whether a valid agreement to arbitrate exists is determined by reference to the law applicable to contracts generally. [Citations.] [¶] Before a party may be compelled to arbitrate a claim, the petitioning party has the burden of proving the existence of a valid arbitration clause and the dispute is covered by the agreement. [Citations] If the moving party meets its burden, the opponent of arbitration has to prove by a preponderance of the evidence any defense to the petition or motion to compel the dispute to be arbitrated. [Citations.] Each case must be decided on its own facts."

A. *Fraud*

An arbitration clause, like any contract, may be rescinded for fraud and thereby not be enforced. (Code Civ. Proc., § 1281.2, subd. (b); Civ. Code, § 1689, subd. (b)(1); *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973-974 (*Engalla*).) Fraud includes intentional concealment or nondisclosure of material facts which induce an innocent party to enter into a contract. (Civ. Code, §§ 1571-1574, 1689; *Odorizzi v.*

Bloomfield School Dist. (1966) 246 Cal.App.2d 123, 128.) The Supreme Court has identified the following elements of a claim based on intentional concealment or nondisclosure of material facts: "The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) But there is no pecuniary damage element when fraud is asserted as a defense to a petition to compel arbitration. (*Engalla, supra,* 15 Cal.4th at p. 974.)

In *Engalla, supra,* 15 Cal.4th 951, the issue was whether the plaintiffs were fraudulently induced to enter into an arbitration agreement by Kaiser's false representations of the expeditiousness of its arbitration system. The arbitration agreement provided that party arbitrators would be appointed within 30 days and neutral arbitrators within 60 days. However, Kaiser's past history of arbitrations was such that on average the neutral arbitrators were not appointed until almost two years after the demand for arbitration. (*Id.* at pp. 967, 975.) Although the court agreed that Kaiser had no contractual obligation to appoint a neutral arbitrator within 60 days, since the appointment of that arbitrator is a bilateral decision that depends on the agreement of the parties, the court nevertheless found an actionable misrepresentation in Kaiser's false promise to comply with the implied covenant of good faith and fair dealing: "Kaiser's contractual representations were at the very least commitments to exercise good faith and reasonable diligence to have the arbitrators appointed within the specified time. . . . [¶] Here there are facts to support the [plaintiffs'] allegation that Kaiser entered into the

arbitration agreement with knowledge that it would not comply with its own contractual timelines, or with at least a reckless indifference as to whether its agents would use reasonable diligence and good faith to comply with them." (*Id.* at p. 974.)

Here, substantial evidence supports the court's finding that the defendants fraudulently induced Ruzzano into signing the arbitration clause at a time when he was about to be terminated. As detailed, *ante*, in October 2009, Larson complained to Blake that Ruzzano was not working out and there were "serious deficiencies" in his work performance. However, neither told him about the concerns before he signed the arbitration agreement or was terminated.

Despite these facts, on October 29, 2009, Blake provided Ruzzano with the employment agreement containing the arbitration clause. On November 3, 2009, at Blake's urging, Ruzzano signed the agreement.

A few hours after Ruzzano signed the agreement, Larson told him he was being terminated. This fact alone is compelling evidence that defendants induced him to sign the agreement because they intended to fire him and make him submit any wrongful termination claims to arbitration.

Moreover, at the time Ruzzano signed the employment agreement, he was an "at will" employee, who could be terminated for any reason. The employment agreement, however, converted his employment to a one-year term and specified he could only be terminated for cause. Larson claims that Ruzzano was fired on November 3, 2009, because on that date he had a confrontation with her that was "another incidence of unacceptable behavior from Mr. Ruzzano, and constituted an escalation of his behavior

toward me . . . of being very aggressive and highly insubordinate." Defendants do not explain why an employee with alleged "serious deficiencies" in performance, who was "insubordinate" and "aggressive" and who was fired hours after signing that agreement, would have his employment status *improved* in such a manner. This also supports the inference that the purpose of having him sign the employment agreement was to secure an agreement to arbitrate any claims he had against defendants.

Defendants assert that Ruzzano inconsistently is suing upon the same employment contract that he seeks to rescind. However, Ruzzano is not required to rescind the employment agreement as a whole, but may seek to rescind the agreement to arbitrate contained therein. Courts may enforce valid parts of contracts, and sever out invalid or unenforceable clauses. (*Templeton Development Corp. v. Superior Court* (2006) 144 Cal.App.4th 1073, 1084 [illegal term of construction contract that mediation must take place in Nevada was collateral to main purpose of agreement and was easily severed from other provisions dealing with mediation]; *Werner v. Knoll* (1948) 89 Cal.App.2d 474, 476 [clause in lease exempting landlord from liability "from any cause" held to relieve him from liability for ordinary negligence, even though it was invalid under Civ. Code, § 1668 insofar as it applied to liability for fraud, willful injury, or violation of law].)

B. *Lack of Signatures by Defendants*

As stated, *ante*, a party moving to compel arbitration bears the burden of proving that a valid arbitration agreement exists and that question is determined by the law applying to contracts in general. (*Larian v. Larian, supra,* 123 Cal.App.4th at pp. 759-760.)

"When it is clear, both from a provision that the proposed written contract would become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contracts terms would be signified by signing it, the failure to sign the agreement means no binding contract was created." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358.)

Here, it is undisputed that none of the defendants signed the employment agreement containing the arbitration clause. Moreover, the agreement contained a signature block for Larson, to be signed as president of Spectrum. Paragraph 11.5 of the agreement provided: "The parties agree that this Contract, ancillary Contracts, and related documents will be considered signed when the signature of a party is delivered by facsimile transmission [which] will be treated in all respects as having the same effect as an original signature." Paragraph 11.6(B) provided that the contract "may be executed in any number of counterparts, each of which is deemed to be an original, but all of which together constitute one and the same instrument." That paragraph would be unnecessary unless it was envisioned that both parties were to sign the agreement.

In addition, Ruzzano's original at will employment agreement was signed by both parties. Also, when Blake was urging Ruzzano to sign the November 3, 2009 employment agreement, he sent an e-mail to Ruzzano stating, "[A]ssuming you have no concerns, can you please sign the contract and *forward on to* [*Larson*]" (Italics added.)

All of these facts provide substantial evidence supporting the court's finding that the parties contemplated that the employment agreement was to be signed by both parties to be enforceable.

In support of their contention that they need not sign the agreement to make it enforceable, defendants cite two federal cases, *Nghiem v. NEC Electronic, Inc.* (9th Cir. 1994) 25 F.3d 1437 and *Valero Refining, Inc. v. M/T Lauberhorn* (5th Cir. 1987) 813 F.2d 60. However, both cases were decided under the Federal Arbitration Act, not under California law. (*NgHeim, supra,* 25 F.3d at pp. 1439-1440; *Valero, supra,* 813 F.2d at pp. 63-64.) Further, both cases involved particular types of documents that did not need two signatures. (*Ngheim, supra,* 25 F.3d at p. 1439 [employee handbook]; *Valero, supra,* 813 F.2d at pp. 62-64 ["charter party" maritime transaction].)[2]

C. *Waiver*

" 'Generally, "waiver" denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to . . . relinquish the right.' " *Engalla, supra,* 15 Cal.4th at p. 983.) "[T]he question of waiver is one of fact, and an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence." (*Ibid.*)

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2 Because we have concluded there is substantial evidence that the agreement to arbitrate was procured by fraud and was not signed by any defendants, we need not address whether Blake or National University was covered by the agreement to arbitrate.

"Where a party first discovers the basis to oppose arbitration after proceedings commence, it may withdraw from the proceedings and commence litigation." (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2010), ¶ 5:77, p. 5-59, citing *Engalla, supra,* 15 Cal.4th at p. 982, italics omitted.)

Here, Ruzzano produced evidence that he did not discover evidence that he had been fraudulently induced to agree to arbitration until after he commenced arbitration proceedings and took Blake's deposition. That evidence was Larson's previously undisclosed dissatisfaction with his performance. Thereafter, Ruzzano immediately withdrew from the arbitration proceedings. No arbitration proceeding was ever held. These facts presented substantial evidence that Ruzzano did not waive the right to challenge the arbitration clause.

Defendants assert Ruzzano knew far earlier about the fraud in inducing him to sign the agreement because he received a letter on November 6, 2009, stating that Larson had "expressed serious deficiencies in [his] performance . . . ." However, that letter does not state that Ruzzano was informed of Larson's dissatisfaction before he signed the employment agreement on *November 3, 2009.* Accordingly, that evidence does not support Spectrum's waiver claim.

Spectrum cites two cases in support of its waiver argument. However, neither supports Spectrum's contention. In *Kemper v. Schardt* (1983) 143 Cal.App.3d 557, 559, the party seeking to avoid arbitration "appeared at the arbitration hearing . . . testified . . . on both direct and cross-examination, and presented witnesses on his behalf." It was only *after* losing on the merits that the party attempted to challenge

the arbitrator's authority, which the court rejected. (*Id.* at pp. 559-560.) Here, Ruzzano immediately dismissed the arbitration, before any hearing was held, upon discovering defendants' alleged fraud.

Valley Casework, Inc v. Comfort Construction, Inc. (1999) 76 Cal.App.4th 1013 is similarly inapposite. There, the issue of waiver was not before the court. Rather, the issue was whether a nonparty to an arbitration agreement lacked standing to enforce the arbitration agreement. (*Id.* at p. 1024.) The Court of Appeal noted one example of when a nonsignatory could participate in an arbitration proceeding was when he or she "voluntarily joins an arbitration proceeding . . . ." (*Id.* at p. 1021.) It did not address the waiver issue presented here.

DISPOSITION

The order denying defendants' petition to compel arbitration is affirmed. Ruzzano shall recover his costs on appeal.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.